IN THE SUPREME COURT OF THE U. S.

DECEMBER TERM, 1867.

WILLIAM CLARK

VS.

UNITED STATES.

No. 116.

Appeal from the Court of Claims.

BRIEF FOR THE APPELLANT.

HUGHES, DENVER & PECK.
And JOHN M. McCALLA,
OF COUNSEL.

WASHINGTON, D. C.
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IN THE SUPREME COURT OF THE U. S.

December Term, 1867.

WILLIAM CLARK
vs.
THE UNITED STATES. } No. 116.

Appeal from the Court of Claims.

Brief for the Appellant.

ABSTRACT OF THE CASE.

This is an appeal from the Court of Claims. The appellant, who was the claimant below, sued on a written contract, found in the Record, in pages 1 and 2, as follows:

This contract, made and entered into this 30th day of June, A. D. 1846, between William Clark, of Memphis, Tennessee, of the one part, and Joseph S. Watkins, navy agent at Memphis, aforesaid, acting under the authority of the Navy Department, for and in behalf of the United States, of the other part, witnesseth: That the said William Clark, doth hereby contract and engage with the said Joseph S Watkins, as follows: that for the consideration hereinafter mentioned, the said William Clark will furnish all the material and make 221,000 cubic yards of embankment at the navy yard at Memphis, Tennessee, or so much as shall be required of him by the engineer or other duly authorized agent; the embankment to be made of clay, sand, gravel, or other good material, in such manner and places as shall be directed by the said engineer or other authorized agent. And the said William Clark doth further engage and contract to finish this embankment on or before the 15th day of July, 1847. And the said William Clark doth further engage and contract that no member of Congress, officer of the navy, nor any person holding any office or appointment under the Navy Department, shall have any interest or be in anywise concerned, either directly or indirectly, in any of the issues, or profits, or receipt of this contract. And the said Joseph S. Watkins, acting as aforesaid, doth hereby contract and engage with said William Clark, as follows: That for the materials and embankment made, approved of, and

received, and inspected as aforesaid, according to the terms and stipulations of this contract, there shall be paid to the said William Clark, or order, by the navy agent at Memphis, on account of all bills presented for the aforesaid materials and work delivered and executed, made out in approved form, authenticated by the certificate of the inspecting officer or officers, and approved by the commanding officer of said yard, the following price, viz: eighteen cents for every cubic yard. And it is hereby further stipulated and agreed between the parties hereto, that the department reserves to itself the right of diminishing or increasing the above named quantity of embankment; and should the quantity be increased or diminished, the same price as is specified for the embankment shall be paid to the contractor, and no more. No other charge to be admitted nor allowance to be made by the United States for or on account of this contract, and ten per centum to be withheld from the amount of all payments on account thereof as collateral security, in addition to the bond given to secure its performance, and not in any event to be paid until it is in all respects complied with; and ninety per centum of the amount of all deliveries made will be paid by the said navy agent within thirty days after bills duly authenticated, as aforesaid, shall have been presented to him. In testimony of all such agreements and stipulations, the parties above named have hereunto signed their names and affixed their seals this 30th day of June, A. D. 1846.

WILLIAM CLARK, [L. S.]
JOSEPH S. WATKINS, [L. S.]
Navy Agent.

Signed, sealed, and delivered in presence of—
W. C. ROGERS.
E. L. CONANT.

The Court of Claims find and certify to this Court the following facts, found at page 9 of the Record:

"1. That the claimant made and entered into the agreement for the building 221,000 yards of embankment in the navy yard at Memphis, Tenn., set forth in the petition in this action, and that he built under such contract 128,913.55 yards of said embankment, for which he has been fully paid by the defendants.

2. That the system of measurements pursued by the officers of the United States, and by which the said quantity of 128,913.55 yards is computed, consisted in measuring from a fixed base monthly, and that the claimant at the time duly objected to such system of measurement, and claimed that he should be paid for the quantity of earth actually deposited by him on said embankment.

13. 3. That there was a waste and shrinkage of the embankment while building, and a natural settling of the batture on which the embankment was built, and that the loss occasioned

thereby necessarily was borne by the claimant under the system of measurements adopted.

4. That the said system of measurements was the one customarily used on the public works of the Government, and that there was no competent evidence offered by the claimant to show a contrary custom.

5. That the officers of the Government interfered with the claimant in the execution of his work, compelling him to dump loose earth where it was exposed to the direct currents of the river, and that they also used the embankment as a roadway, to the loss
13½ and injury of the claimant, but that all of such acts of which there was sufficient evidence, occurred subsequent to the 15th day of July, 1847, and when the claimant was in default in not having performed his said agreement and completed the said embankment."

And the Court of Claims decided and certified to this Court the following questions of law:

"1. That the affidavits of Morrison, Todd, Maher 1st, Maher 2d, Liston and Seal, offered in evidence by the claimant upon the trial herein, being affidavits taken exparte by the claimant, for the purpose of presenting and sustaining his said claim before Congress, are not sufficient or competent evidence; and are not admissible in this action, and the court therefore excludes the same.

2. That the letters and communications from the commandant and engineer officers of the Memphis navy yard, offered in evidence by the claimant upon the trial herein, and written subsequent to the performance of the work by the claimant, and relating to the controversy between him and the defendants, are irrelevant and incompetent as evidence, and therefore excludes the same.
15 3. That the contract aforesaid was entire and not severable, and that by the terms thereof the claimant could only recover for the embankment completed and not for the quantity of earth deposited by him therein, and that as a necessary and legal consequence thereof all loss by settling, shrinkage, and the action of the currents of the river was to be borne by the claimant and not by the United States.

4. That the claimant was not entitled to recover for the interference of the defendants or their officers subsequent to the 15th July, 1847, the time when the work under his said contract was to have been completed by the terms of his agreement."

Points for the Appellant.

1. Under the contract, the work or embankment made by the claimant was at the risk of the United States for all loss by shrinkage, waste, sinking of the alluvial bottom, &c., from and after each monthly measurement, inspection, and payment.

2. The embankment in progress was at the risk of the contractor for loss by shrinkage, waste, &c., only to the extent of the work done since the last preceding monthly measurement and payment.

3. As the contractor was bound to obey the United States Engineers in performing his work, he is entitled to recover under a *quantum meruit* for all earth carted and thrown into currents of water, under the peremptory orders of the Engineers, whether within the time limited for the completion of the work or not. The construction of the contract must be *reasonable*, and under a contract to make an embankment under the orders of Engineers, the party is entitled to recover for all materials which he was required to throw into the rapid current of the Mississippi River, where the water was from four to eleven feet deep, whether there was any embankment left to be measured or not.

4. That the affidavits of Morrison, Todd, Maher 1st, Maher 2nd, Liston, and Seal, were improperly excluded by the Court below. (*See Record, page* 9.)

5. That the letters and communications from the Commandant and Engineers of the Memphis Navy Yard, excluded by the Court of Claims, as stated in the Record, at page 9, were competent evidence and improperly excluded.

AUTHORITIES.

Woods vs. Russell, 5 *Barnwell and Alderson, p.* 942.
Cunningham vs. Morrell, 10 *Johnson's Reports, p.* 202.
Devereux's Reports Court of Claims, p. 83, *note.*

HUGHES, DENVER & PECK,
JOHN M. McCALLA,
Of Counsel for Appellant.

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Supreme Court of the United States.

DECEMBER TERM, 1867. No. 138.

WILLIAM CLARK, APPELLANT,

VERSUS

THE UNITED STATES.

BRIEF FOR THE UNITED STATES.

J. J. WEED,

Assistant Solicitor for the United States.

RUSSELL & MORRISON, PRS.

Supreme Court of the United States.

DECEMBER TERM, 1867.—No. 116.

WILLIAM CLARK, APPELLANT,

vs.

THE UNITED STATES.

BRIEF FOR THE UNITED STATES.

I.

The appellant instituted his suit in the Court of Claims to recover the sum of *twenty-five thousand five hundred and thirteen dollars and fifty-one cents*, and upon the hearing of the case in that court, judgment was rendered against the appellant, and from that judgment the appellant prosecutes his appeal here.

The Court of Claims, in accordance with the rules of this court, in regard to appeals from that court, have certified the following findings or statement of facts:

1. That the claimant made and entered into an agreement for building 221,000 yards of embankment in the navy-yard at Memphis, Tennessee, set forth in the petition in this action, and that he built under such contract 128,913 55-100 yards of said embankment, for which he has been fully paid by the defendants.

2. That the system of measurement pursued by the officers of the United States, and by which the said quantity of 128,913 55-100 yards is computed, consisted in measuring from a fixed base monthly, and that the claimant at the time duly objected to such system of measurement, and claimed that he should be paid for the quantity of earth actually deposited by him on said embankment.

3. That there was a waste and shrinkage of the embankment while building, and a natural settling of the batture on which the embankment was built, and that the loss occasioned thereby necessarily was borne by the claimant, under the system of measurements adopted.

4. That the system of measurements was the one customarily used on the public works of the Government, and that there was no competent evidence offered by the claimant to show a contrary custom.

5. That the officers of the Government interfered with the claimant in the execution of his work, compelling him to dump loose earth where it was exposed to the direct currents of the river, and that they also used the embankment as a roadway, to the loss and injury of the claimant; but that all of such acts, of which there was sufficient evidence, occurred subsequent to the 15th day of July, 1847, and when the claimant was in default in not having performed his said agreement, and completed the said embankment.

The Court of Claims, from the foregoing statement or finding of facts, decided, in regard to the claimant's right to recover upon his contract and the evidence he adduced to establish a violation of it on the part of the United States, as follows:

1. That the contract upon which the claimant relied was entire, and not severable; and that by the terms thereof the claimant could only recover for the embankment completed, and not for the quantity of earth deposited therein; and that, as a necessary and legal consequence thereof, all loss by settling, shrinkage, and the action of the currents of the river, was to be borne by the claimant, and not by the United States.

2. That the claimant was not entitled to recover for the interference of the defendants or their officers subsequent to the 15th day of July, 1847, the time when the work under his said contract was to have been completed, by the terms of his agreement.

II.

The contract from which this controversy results is as follows:

"This contract, made and entered into this 30th day of June, A. D. 1846, between William Clark, of Memphis, Tennessee, of the one part, and Joseph S. Watkins, navy agent at Memphis aforesaid, acting under the authority of the Navy Department for and in behalf of the United States, of the other part, witnesseth: That the said William Clark doth hereby contract and engage with the said Joseph S. Watkins as follows: that for the consideration hereinafter mentioned, the said William Clark will furnish all the material and make 221,000 cubic yards of embankment at the navy-yard, Memphis, Tennessee, or so much as shall be required of him by the engineer or other duly-authorized agent; the embankment to be made of clay, sand, gravel, or other good material, in such manner and places as shall be directed by the said engineer or other authorized agent. And the said William Clark doth further engage and contract to finish this embankment on or before the 15th day of July, 1847. And the said William Clark doth further engage and contract that no member of Congress, officer of the Navy, nor any person holding any office or appointment under the Navy Department, shall have any interest, or be in anywise concerned, either directly or indirectly, in any of the issues, profits, or receipts of this contract. And the said Joseph S. Watkins, acting as aforesaid, doth hereby contract and engage with the said William Clark as follows: That for the materials and embankment made, approved of, and received, and inspected as aforesaid, according to the terms and stipulations of this contract, there shall be paid to the said William Clark, or order, by the navy agent at Memphis, on account of all bills presented for the aforesaid materials and work delivered and executed, made out in approved form, authenticated by the certificate of the inspecting officer or officers, and approved of by the commanding officer of said yard, the following price, viz: eighteen cents for every cubic yard. And it is hereby further stipulated by and between the parties hereto, that the Department reserves to itself the right of diminishing or increasing the above-named quantity of embankment; and should the quantity be increased or diminished, the same price as is specified for the embankment shall be paid to the contractor, and no more. *No other charge to be admitted nor allowance to be made by the United States for or on account of this contract, and ten per centum to be withheld from the*

amount of all payments on account thereof, as collateral security, in addition to the bond given to secure its performance, and not in any event to be paid until it is in all respects complied with; and ninety per centum of the amount of all deliveries made will be paid by the said navy agent, within thirty days after bills duly authenticated as aforesaid shall have been presented to him. In testimony of all which agreements and stipulations, the parties above named have hereunto signed their names, and affixed their seals, this 30th day of June, A. D. 1846.

WILLIAM CLARK. [L. L.]
JOSEPH S. WATKINS, [L. S.]
Navy Agent.

Signed, sealed, and delivered in presence of—
W. C. ROGERS,
E. L. CONANT.

It is very clear, from an inspection of this contract, that the claimant on his part contracted to do two things—

1. That he would furnish the labor and materials necessary to the construction of *two hundred and twenty-one thousand cubic yards* of embankment at the navy-yard in Memphis, Tennessee.

2. That said embankment was to be completed by the 15th day of July, 1847.

This work, until its completion and acceptance by the United States, was at the risk of the contractor. He must therefore bear the loss which he alleges he sustained in consequence of the overflow of the river along which his embankment was being built, and the loss sustained by the action of the currents upon said embankment while in the process of construction, and before its delivery to and acceptance by the United States.

The rule applicable to such a state of facts is well stated, as follows:

"Where the workman is to furnish the materials as well as the work, if the thing happen to perish before it is completed and delivered to the employer, in whatever manner the loss may be, whether it be by inevitable accident, or irresistible

violence, or otherwise than by the default of the employer himself, the loss is to be borne by the workman; for in such a case he is deemed the owner of the thing; and *res perit domino.*"

Story on Bailments, sec. 427 *a.*

The contract of the claimant with the United States was entire, and not several. It bound the claimant to do a specific thing, for which the United States agreed to pay a specified price. The contractor was to be paid "for the materials and work *delivered* and *executed*," and "for the materials and embankment *made.*" It is assumed on the part of the appellant that, inasmuch as his contract with the United States provided that he should be paid ninety per cent. of the amount earned by him under his contract, from time to time, as the work progressed, that the contract was therefore *severable*, and not *entire;* and that so soon as any portion of the work had been inspected and accepted by the engineers appointed for that purpose, that such portion was thereafter at the risk of the United States. The insertion of the provision in the contract "*for payments on account*" cannot change the character of the contract. Such a provision could not affect its *entirety*. Where such a provision is inserted in a contract, the intermediate estimates are not to be regarded as separate admeasurements, but mere estimates of its relative progress. And the stipulation itself is held to be only equivalent to a provision that the company or Government shall from time to time, as the work progresses, advance a stipulated portion of the pay for the work which the engineer shall adjudge to be done.

Redfield on Railways, vol. 1, sec. 116, p. 207.

Ranger *vs.* the Great Western Railway, 27 English Law and Equity R.

It has been settled by repeated decisions, that although a contract provides for payment by instalments, and by estimates as the work advances, it is entire, and the contractor must finish an entire thing, or be excused from it, before he can recover upon such contract.

Cunningham *vs.* Morrell, 10 John R., 203.

Tompkins *vs.* Elliott, 5 Wend., 496.
McLane *vs.* Rush, 9 Dana, 64.
McKnight *vs.* Dunlop, 4 Barb., S. Ct., 36.

It is assumed, therefore, that the appellant could maintain no action upon this contract until he had presented to the United States for its acceptance that completed embankment which his contract contemplated and required him to construct.

The appellant was to complete the work under his contract by the 15th day of July, 1847. The United States were entitled to use and occupy the work subsequent to that time. He complains and attempts to show that he sustained loss and injury to his embankment, subsequent to that time, by the action of the water upon it, and by its use by the United States. The appellant cannot recover anything upon these allegations, unless he shows that his failure to complete the contract within the specified time was the result of the action of the United States or iis agents.

These are the only questions which this record suggests for consideration.

The questions which the appellant seeks to present for the consideration of the court, which relate to the admissibility or sufficiency of the evidence, cannot be considered here. The appellant has not by seasonable and proper exceptions saved them upon the record, so that they could be transmitted by the Court of Claim for consideration here.

It is submitted, therefore, that there was no error in the judgment of the Court of Claims, and that its judgment rendered in this case should be affirmed here.

JOHN J. WEED,
Assistant Solicitor for the United States.